

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**BECKLEY DIVISION**

JAMES MICHAEL FLIPPO,

Petitioner,

v.

CIVIL ACTION NO. 5:05-cv-00765

THOMAS MCBRIDE, Warden,

Respondent.

**ORDER**

Before the Court is Petitioner's Motion for a Certificate of Appealability [Docket 33] in which the Petitioner seeks to appeal this Court's Memorandum Opinion and Order [Docket 31] adopting the recommendation of the magistrate judge and denying Petitioner's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 2253(c)(2), Petitioner must demonstrate "a substantial showing of the denial of a constitutional right" before a certificate of appealability will issue. To meet this standard Petitioner must "sho [w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Petitioner seeks a certificate of appealability with respect to three issues identified by him as follows:

1. Whether Mr. Flippo's Due Process rights were violated by the junk science/false testimony of Irvin Sopher;

2. Whether the State violated the Due Process Clause of the United States Constitution as well as *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 393 U.S. 1024 (1969), by introducing the testimony of Irvin Sopher, which it knew or should have known was false; and

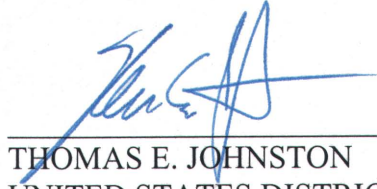
3. Whether Mr. Flippo received ineffective assistance of counsel based on trial counsel's sua sponte introduction of the issue of whether Mr. Flippo is a homosexual to the jury.

The Court has reviewed each of Petitioner's arguments set forth in his memorandum of law and finds them to be without merit. Nonetheless, the Court concludes that based on the complexity of issues in this case that Petitioner has made the requisite showing that the merit of his arguments could be debatable. Therefore, the Court **GRANTS** Petitioner's Motion for a Certificate of Appealability [Docket 33].

**IT IS SO ORDERED.**

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: July 8, 2009

A handwritten signature in blue ink, appearing to read 'Thomas E. Johnston', is written over a horizontal line.

THOMAS E. JOHNSTON  
UNITED STATES DISTRICT JUDGE